

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HARCZ, ET AL.,

Plaintiff,

v.

File No. 1:17-cv-112

BOUCHER, ET AL.,

Defendants.

/

Hearing

Before

THE HONORABLE GORDON J. QUIST
United States District Court Judge
November 2, 2017

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1 Grand Rapids, Michigan

2 Thursday, November 2, 2017 - 2:08 p.m.

3 THE COURT: We're here on the case of Harcz --
4 is that how you pronounce his name?

5 MS. PORTER: Yes, sir.

6 THE COURT: v. Bow-cher?

7 MR. FEDYNSKY: Boo-shay.

8 THE COURT: Boo-shay. Okay. Boucher.

9 Arguments and motions to dismiss for summary judgment. Can
10 I have the appearance of counsel, please?

11 MS. PORTER: Yes, your Honor. Julie Porter
12 present for the plaintiffs, three of whom are present in
13 court today. Mr. Harcz is here, as is Eleanor Canter and
14 Brian Dian.

15 THE COURT: I recognize them from some videos.

16 MS. PORTER: Yes. Yes, your Honor.

17 MR. FEDYNSKY: Good afternoon, your Honor.
18 Assistant Attorney General John Fedynsky. I'm here on
19 behalf of the individual State Defendants.

20 THE COURT: Thank you.

21 MR. SCHRAMM: Your Honor, Tom Schramm on behalf
22 of defendant Handicapper Advocacy Alliance, Inc.

23 THE COURT: Thank you.

24 MR. MEIHN: May it please this Court, your
25 Honor. Greg Meihn on behalf of the Michigan Association of

Centers for Independent Living.

THE COURT: Thank you. Okay, let me tell you where I'm coming from. I've spent substantial time reading the materials, doing a little bit of independent research. I found it interesting, actually, you know, because of all the things that are going on regarding freedom of speech in the street, so to speak, and then meetings. So it was an interesting area of law. I've had First Amendment cases before, but none quite so dramatic as this particular one.

Like I said, I've spent a substantial amount of time, and I'll start with -- and this is going to be more of a conversation than standing up here and giving a speech to me, because that would be just wasting time.

I'm going to start with telling the plaintiff some of my problems, and you can stand up there, Ms. Porter --

Ms. Porter --

MS. PORTER: Yes, your Honor.

THE COURT: -- and respond to these. I have difficulty in bringing the two organizations, Michigan Centers For Independent Living and Handicapper Advocacy Alliance into the case. And the reason is, as you well know, under 42 United States Code Section 1983 you have to be a state actor, and the only way I see you trying to get around it, because they're not state actors, is a conspiracy. And here's the problem that I have. Am I

1 right so far?

2 MS. PORTER: Yes.

3 THE COURT: Okay. Then here's the problem I
4 have. Basically, your argument boils down to if someone
5 talks to the police or makes a report to the police and the
6 police react thereto, that's a conspiracy.

7 For example, let's say that I'm watching my
8 neighbor's house and I don't know their whole family and I
9 see someone trying to break into the house and I call the
10 police because that's what I'm supposed to do. It turns
11 out that it's the neighbor's son coming home from college
12 or something. Am I a conspirator for calling the police
13 when the person that was breaking into the house was just a
14 college kid that lost his key? What's the difference
15 between that set of facts and your case?

16 MS. PORTER: The answer to your question is no,
17 you are not a conspirator, and that is different from our
18 set of facts because we allege more than simply a report to
19 the police. If what had happened is that representatives
20 of the two organizational defendants simply alerted police,
21 "We believe there may be protestors at our event. Thank
22 you very much," hang up the phone, we would not have
23 brought them into this case and alleged that they were
24 co-conspirators. Here, however, our pretrial factual
25 development suggested to us that it was a more concerted

1 activity than that. There were multiple discussions, even
2 meetings in between the organizational defendants and the
3 police, culminating in a meeting the morning of the event
4 where we allege that representatives of the two
5 organizational defendants sat down with the representative
6 from Michigan State Police and they agreed that the way
7 this would be handled is that the protestors who they
8 expected would be kept out of the event. It's more than
9 just, you know, here's our tip, you do what you want. It
10 was an expression, "We don't want these people disrupting
11 the event. What are we going to do about it?" And they
12 reached an agreement that this is what they would do. The
13 Michigan State Police would show in force and would keep
14 these people from coming in.

18 THE COURT: Was it the full --

19 MS. PORTER: -- significant.

20 THE COURT: The cases that I've read involving
21 the conspiracy theory, which is an exception to all the
22 general rules --

23 MS. PORTER: Yes.

24 THE COURT: -- showed a much different kind of
25 participation by the individuals who are not police

1 officers. They might have been informants for the police,
2 for example, or they might have been a paid undercover
3 person that was not a police officer, or they might have
4 been a physician hired by the Michigan Department of
5 Corrections to take work that was ordinarily done by
6 physicians employed by the Michigan Department of
7 Corrections, those kinds of things. But when just talking
8 to the police and when the police have full authority to
9 take all the acts and the other -- the organizational
10 defendants did not have any authority at all, I have a
11 difficult time. I still do. I understand your argument,
12 but we'll see what the other side says, but do you want to
13 say anything more about that?

14 MS. PORTER: The only thing that I'll add, your
15 Honor, is that I think one thing that does make this a bit
16 different from the scenario that you're talking about is
17 the level of detail that we have alleged in the complaint
18 concerning the interaction between the nongovernment
19 organizations on one hand and the State Police on the
20 other. I think that separates it from the situations that
21 you're talking about. And at this stage we do believe that
22 that's something that we should be exploring in discovery.
23 I think at a summary judgment stage if -- if --

24 THE COURT: What would you discover? That was
25 the next question I was going to ask.

1 MS. PORTER: Yes, your Honor.

2 THE COURT: Actually.

3 MS. PORTER: On this issue?

4 THE COURT: Yes. What further discovery would
5 you want? For example, if you have a motion for summary
6 judgment, and one of the motions is for summary judgment,
7 and if you want discovery for a period of time, and here we
8 have motions to dismiss, we'll treat them all that way.

9 MS. PORTER: Correct.

10 THE COURT: You have a motion for summary
11 judgment, and I don't know what the law is on motion to
12 dismiss. According to Sixth Circuit precedent, you have to
13 have sort of a plan. You have to tell the judge what
14 you're going to do, what discovery do you want.

15 MS. PORTER: Right. So on the issue with HAAI,
16 they allege that they should be out, among other reasons,
17 because Ellen Weaver, who we name in the complaint, did not
18 in fact act as their representative. In our prefilings
19 investigation, and this was part of the affidavit on
20 Exhibits that I submitted, we obtained police reports from
21 Michigan State Police that did name her and clearly viewed
22 her as acting on the organization's behalf, not only in
23 making reports to the police about what was happening, but
24 in also sharing detailed information, such as, you know, we
25 had a permit for this bus. Now if the bus comes, you know,

1 we don't want to allow them to park there, which we
2 understand to be, again, seeking agreement from the police
3 to help stop, you know, this bus from parking in front of
4 the capitol building.

5 We would, among other things, take discovery on
6 Ellen Weaver's actual relationship to HAAI at that point in
7 time, whether she was in fact acting in ways that under the
8 law constitute an agency relationship, such as the
9 organization would be held responsible for her activities.
10 We also specifically described that we would take discovery
11 about the actual discussions between the State Police on
12 one hand and these nonorganizational defendants. We have
13 some police reports that make certain statements. I want
14 to test those reports. I want to find out from the parties
15 who participated in them what was said. I want to find out
16 if there were additional discussions that were not
17 memorialized in police reports. I will tell the Court
18 right now I don't have any knowledge of such discussions.
19 I'm not telling the Court that I believe that there were
20 secret conversations not memorialized, but I think the
21 prefiling investigation we did that turned up those reports
22 give us a very healthy curiosity about the back-and-forth
23 that occurred, which would be very relevant to our claim of
24 a conspiracy.

25 THE COURT: Okay. Thank you.

1 MS. PORTER: Thank you, judge.

2 THE COURT: Mr. Schramm?

3 MR. SCHRAMM: Yes, your Honor.

4 Your Honor, I think you hit the nail on the head
5 with respect to a key problem in the plaintiff's action
6 against Handicapper Advocacy Alliance, HAI, [sic] that
7 also spills over to the other defendants in this action.

8 The alleged conspiracy is nothing more than a
9 conversation or two among various defendants with the
10 police department. In fact, in this case it's even more
11 removed from a conspiracy with respect to my client, HAI.
12 In fact the allegation in the complaint is only that Ellen
13 Weaver spoke with the police and said that she did not want
14 the protestors to obstruct the event. That is what she
15 said to the police in the early conversation.

16 THE COURT: Who was it that wanted -- didn't
17 want that bus to park there? Was that Ms. Weaver as well?
18 I forget, actually. That's why I'm asking.

19 MR. SCHRAMM: It is referenced in the police
20 report that she did not want the bus to stop there.
21 However, there is, as I understand it, no dispute in this
22 case that the bus parked at the site requested, and the
23 plaintiffs exited the bus and came onto the entranceway to
24 the capitol grounds. So I don't see a case here with
25 respect to parking a bus. I haven't seen any allegations

1 of a conspiracy regarding parking a bus. That came out of
2 left field. I heard an oral argument here today, but it
3 does not fit within the alleged conspiracy that the
4 plaintiff has presented here. The plaintiff has filed a
5 complaint. That complaint alleges a conversation where
6 Ellen Weaver said she didn't want the protestors to
7 obstruct the event. She did not then direct the police or
8 agree with the police that the bus would not be parked at
9 that location. There's no allegation of that.

10 In addition, what we have here is within the
11 complaint some key admissions. We have an admission at
12 paragraph 41 of the complaint, act one of course in this
13 action, that in a separate conversation not involving
14 Ms. Weaver or my client, Sergeant Held, one of the State
15 defendants in this action, assured Sara Grivetti, a
16 representative of the other defendant, MACIL, that no one
17 would be permitted to protest at the event. So that
18 conversation was had not with Ms. Weaver or my client, not
19 with anyone attributed to my client. That conversation was
20 had, as alleged in the complaint, with two other defendants
21 in this action.

22 Following that conversation, as alleged in the
23 complaint, the State Police met and created an operational
24 plan, and the decision was made that the police would be
25 present at the AGA event. So once again, if there were a

1 conspiracy, and I would argue to this Court there was not,
2 that conspiracy was launched in what I've just described a
3 fact pattern of a conversation, decisions, and an
4 operational plan formed all without Ms. Weaver or my
5 client's involvement. My client simply saying preceding
6 this plan, if you will, as it would be alleged in the
7 complaint, my client simply saying to the police, "I don't
8 want them to obstruct the event" is not a conspiracy.

22 THE COURT: Okay.

23 MR. SCHRAMM: This entire discussion I've just
24 presented with respect to the alleged conspiracy has a
25 second layer of difficulty that has not effectively been

1 rebutted by the plaintiff in this case.

2 THE COURT: Well, is that that she wasn't even
3 employed by --

4 MR. SCHRAMM: Yes, your Honor.

5 THE COURT: Okay. That's what I was going to
6 raise. That's exactly the question I was going to ask. Go
7 ahead.

8 MR. SCHRAMM: Yes, your Honor. And I've
9 presented affidavits from the executive director, Mark
10 Pierce, of my client, as well as Ms. Weaver herself,
11 describing how she was on a volunteer committee. And that
12 volunteer committee created a lot of the organization
13 behind the ADA event. That volunteer committee was not my
14 client. And in this case the plaintiff did not conduct
15 discovery, request a deposition after I filed my motion,
16 but in addition, and I think it's very important, is that
17 in order to request additional discovery, the plaintiff
18 needs to identify why they were unable to present to this
19 Court information raising a genuine issue of material fact.
20 And in this case the plaintiff has never explained why
21 Mr. Harcz, who was on that same volunteer committee with
22 Ms. Weaver, did not present an affidavit saying Ms. Weaver
23 was a representative of my client.

24 There's no affidavit. There's no reason why
25 there's no affidavit other than it's just not true.

1 Because Ms. Weaver was not a representative of my client,
2 and Mr. Harcz was on the volunteer committee. And if he
3 had a different opinion or the plaintiffs had a different
4 opinion who had many interactions, as alleged in the
5 complaint, they should have presented an affidavit saying
6 we didn't just file a complaint saying Ms. Weaver was a
7 representative of HAI, we actually believe that because X.

8 There is no evidence to that effect, and the
9 plaintiff had a burden to demonstrate to this Court why
10 they could not come to this Court with sufficient
11 information and need to conduct additional discovery.

12 THE COURT: Okay, thank you.

13 MR. SCHRAMM: Thank you, your Honor.

14 MR. MEIHN: Your Honor, may I address that --

15 THE COURT: Yup. Definitely.

16 MR. MEIHN: -- question on behalf of --

17 THE COURT: You were the next guy on the list.

18 Mr. Meihn, is it?

19 MR. MEIHN: It is. Correct, your Honor.

20 THE COURT: All right.

21 MR. MEIHN: If I could just have the Court back
22 up for a moment. Plaintiff's counsel admitted in her
23 statements to you the very reason why dismissal is
24 appropriate as to all the defendants, but specifically
25 MACIL. And the reason is is, she thinks she wants to find

1 information, she thinks there could be information, maybe
2 this. She's missed out on, unfortunately, judge, that on
3 Iqbal and Twombly they had an obligation to promote facts
4 that are sufficient enough to give a belief that there is a
5 basis well seated in the case. On the state after claim
6 that pled nothing as it relates to MACIL, other than the
7 fact that they say, well, Grievant and Sergeant Hand had
8 agreed upon that the protestors would be held at a certain
9 place.

10 Now let's back up for a moment. That's it.
11 That all the rest of the allegations of talking to them
12 give no evidence of a conspiratorial nature. But here is
13 the other thing that we're not talking about and we should.
14 First of all, MACIL has -- MACIL has a right, their own
15 first amendment rights play a role here. They just, it's
16 not the plaintiffs that get to say our First Amendment
17 rights trump over everybody else's. And there's nothing
18 conspiratorial about MACIL and grievant going up to the
19 police and saying, "I believe something's going to happen."
20 In fact if we didn't do that, if we -- if we held that was
21 conspiratorial, everybody, judge, would be deemed to be
22 somehow part of the process.

23 THE COURT: That was my point with counsel,
24 Ms. Porter, that there's somewhere there's a line to be
25 crossed. It is correct in my judgment that merely talking

1 to the police does not make one a conspirator, especially
2 when you leave the decision as to what's going to occur up
3 to up to the police? It's a tricky way to -- tricky thing
4 to articulate because you start getting into legal
5 conclusions as well as factual actions.

6 MR. MEIHN: You do. And there's one other thing
7 that helps you with that, your Honor.

8 THE COURT: Yeah.

9 MR. MEIHN: And what helps you with that is the
10 fact when you look at the Startzell and the City of Memphis
11 cases that are cited and you started to go down that road,
12 when it talks -- those cases talked about what the inner
13 reaction was, what the proof was necessary to create a
14 conspiracy. Nothing like that is here, other than a
15 citizen who is putting on an event who hears that this may
16 be subject to disruption and protest simply makes the
17 police aware.

18 Now what is also important in an admission in
19 this case is that nowhere in plaintiff's complaint do they
20 allege, nor can they, that grievant or MACIL was aware of
21 what the state was going to do, the erection of the steel
22 barriers, the action that they had taken when he tried to
23 come through the barriers, they weren't part of that
24 process. They weren't aware of that process. The State
25 acted the way the State acted based upon the information

1 that was before them.

2 When you look back at the City of Memphis and
3 you look back at Startzell, that kind of information
4 existed. It doesn't exist here. Why? Because there's no
5 conspiracy, because as a citizen she simply brought
6 something to the State Police.

7 And then last, and I'll conclude, let's not lose
8 sight, she has a First Amendment right to be heard. And
9 that First Amendment right to be heard, judge, in the cases
10 I cite, allow her to step one step forward to the State
11 Police and say, "My First Amendment right is going to be
12 trampled upon. What can we do?" And the State then takes
13 the action that they feel is appropriate. She didn't do
14 it. She didn't tell them, "Erect a barrier." She didn't
15 tell them where to put the place. At least there's no
16 allegations in this, and they're constrained by their
17 allegations, judge. And if they didn't have it, a
18 complaint's not supposed to be filed.

19 And that's the argument that I make. So first
20 it's no state action at all, but second of all, you have to
21 look at state action with the overlay, your Honor, of the
22 First Amendment rights that grievant had and MACIL had in
23 putting on this program. And that's the background as to
24 how this came about.

25 THE COURT: Okay, thank you.

1

MR. MEIHN: Thanks, judge.

2

THE COURT: Ms. Porter, final words, ma'am.

3

MS. PORTER: Thank you, your Honor.

4

Your Honor, I'm not going to dwell on the
5 freedom bus because it's really not relevant to the outcome
6 of your decision on the issues that you're questioning us
7 about, but it is disputed that the plaintiffs came off that
8 bus. They did not, for whatever that's worth. More to the
9 point, Mr. Schramm takes plaintiffs to task for not taking
10 discovery about some of the issues that we now claim we
11 need discovery on.

12 As I laid out in my affidavit as an officer of
13 this court I had a belief. If I'm wrong, I am okay being
14 told that, that with the filing of dispositive motions that
15 it was not an appropriate time to commence a Rule 26(f)
16 conference or to seek this Court's blessing of the
17 scheduling order. In fact, once I received the reply brief
18 from HAAI in this matter, I reached out to counsel, told
19 them I was surprised at their position that since they were
20 amenable to conducting discovery, let's get going, and I
21 sought to schedule a Rule 26(f) conference with HAAI.
22 There has been objection from the other defendants in
23 communication with your Honor's case manager who apparently
24 advised that plaintiff's counsel, me, was correct, that we
25 should not be commencing discovery until resolution of the

1 motions here. So if I was wrong and dilatory in not
2 seeking to depose Ms. Weaver or take other discovery while
3 these motions were pending, that is my mistake and I'm
4 sorry for that. I ask that it not be --

5 THE COURT: But what do you think you could
6 find?

7 MS. PORTER: Well, what --

8 THE COURT: You really don't know what you can
9 find.

10 MS. PORTER: Well, your Honor, one of -- one of
11 the key issues they are arguing is that Ellen Weaver is
12 not -- is not responsible for the acts of HAAI. They point
13 to her not being in the --

14 THE COURT: Or HAAI is not bound by Ellen
15 Weaver's acts --

16 MS. PORTER: Yes, your Honor.

17 THE COURT: -- is a good way to say that, I
18 think.

19 MS. PORTER: Yes, your Honor. And --

20 THE COURT: I almost always called her Elizabeth
21 Weaver, but we all know --

22 MS. PORTER: Yes. Yes, that's correct. And --
23 and we did supply, as an exhibit to the affidavit that I
24 submitted to this Court what we believe constitutes
25 evidence that she was holding herself out as a

1 representative of that organization at the time and --

2 THE COURT: The address you're talking about?

3 MS. PORTER: That's part of it. Also -- that is
4 part of it. It is possible -- your Honor, we could be
5 wrong. It is possible that the Michigan State Police were
6 entirely incorrect in associating her not just in that line
7 but all throughout the report with the actions of that
8 organization. The permit was issued, my understanding is
9 the permit was issued to the organization in her name at
10 the business address. There were multiple other instances
11 throughout the report tying her to the organization. That,
12 and, you know, no, I did not have my client submit an
13 affidavit about his understanding of her role, because that
14 was no different than the information that I was already
15 providing in connection with the report.

16 Beyond that though, your Honor, the complaint,
17 and I'm looking here at the paragraphs on pages 10 and 11
18 where we describe what we --

19 THE COURT: Just a minute. I'll be right with
20 you here. Pages 10 and 11?

21 MS. PORTER: Yes, your Honor.

22 THE COURT: Okay, I've got it.

23 MS. PORTER: Up at the top, it goes to the prior
24 page, page 9, paragraph 40, you know, through page 10 and
25 onto page 11. In those paragraphs we describe what we

1 understand, based only off of the middle prefiling
2 investigation that we were able to do, we describe what we
3 believe happened. But let me take paragraph 46 as an
4 example. Even though, and this is describing a meeting
5 among a representative of the Michigan State Police,
6 Sergeant Jeff Held, and then on the other hand Sara
7 Grivetti and Ellen Weaver.

8 Even though there was no basis whatsoever to
9 conclude that plaintiffs or their colleagues were violent
10 or any threat to public safety at all, defendant Sergeant
11 Jeff Held agreed with Sara Grivetti and Ellen Weaver that
12 Sergeant Held would cause the Michigan State Police to
13 exclude anyone that they believed were protestors from the
14 ADA event. Sergeant Held to Grivetti and Weaver that the
15 Michigan State Police would not permit protestors to pass
16 beyond the Austin Blair statue. What do I think I'm going
17 to get in discovery? I want to know about that discussion.
18 Who decided on the Austin Blair statue? Did Ms. Weaver or
19 Ms. Grivetti have input into that decision? Did they
20 suggest that that would be far enough away not to bother
21 them or constitute a disruption? Was there a discussion
22 about how loud the amplification system would be? Was
23 there discussion -- I don't know these things. And it is
24 not, I'm very familiar with the requirements of Iqbal and
25 Twombly. I would be very surprised if anyone would

1 characterize this complaint as a bare bones recitation of
2 just the elements of the causes of action. We took a lot
3 of care to explain what we knew about the facts and what we
4 allege happened. But there are bound to be some holes when
5 only the defendants possess information that the plaintiffs
6 did not have access to and don't know. And so if we are
7 permitted to take discovery from the organizational
8 defendants in this action, your Honor, we intend to explore
9 more fully the facts that support the conspiracy theory
10 that we're alleging.

11 I do certainly have a lot to say about the first
12 amendment issues, but I don't understand the Court to be
13 asking me about that right now.

14 THE COURT: Not yet. Not yet.

15 MS. PORTER: I will keep my powder dry though.

16 THE COURT: Okay.

17 MS. PORTER: Thank you, your Honor.

18 THE COURT: Your powder, oh.

19 Okay, let's go on then to the next issue that we
20 have. Mr. Harcz, is that how you pronounce his name,
21 H-a-r-c-z?

22 MS. PORTER: Yes.

23 THE COURT: Harcz? Individual claims, malicious
24 prosecution and false arrest under federal and state law.

25 Let me tell you, I've looked at the videos that you had,

1 but not all of them. I did look at the incident. That's
2 because I couldn't figure out quite how to work the
3 computer, but of course the law clerk showed me and I did
4 look at some of them. But I did look more than once at the
5 video showing the incident of the arrest, although it's not
6 really clear, exactly clear as to what happened there.

7 Nonetheless, there was a hearing in front of the
8 district court in Ingham County that found probable cause.
9 Why are not I -- why am I not bound by the finding of
10 probable cause in the criminal case that was at that
11 particular time being prosecuted in Ingham County? I know
12 that they didn't go forward with a trial on it, but and
13 they dismissed the charge, but they did find probable
14 cause. Yup, go ahead.

15 MS. PORTER: There's a couple reasons, judge.
16 There's at least two ways of looking at this. One is that
17 we specifically allege in the complaint that the judge
18 heard false and misleading testimony from a Michigan State
19 police officer at the hearing, and that, combined with the
20 prosecution's presentation, which was also based on false
21 and misleading evidence from police officers, including
22 false police reports, tainted the probable cause decision.

23 We allege that specifically, and also I do not
24 believe our allegations are summary in nature. We cite
25 specific excerpts from the police reports, we cite specific

1 excerpts from the preliminary examination testimony, and we
2 also specific --

3 THE COURT: Did Mr. Harcz have a lawyer at that
4 hearing?

5 MS. PORTER: Yes, your Honor, he did. Uh-huh.

6 THE COURT: Was it you, by the way?

7 MS. PORTER: No.

8 THE COURT: Okay. Wouldn't all of this stuff
9 have been brought out by a lawyer on behalf of Mr. Harcz?

10 MS. PORTER: It is not fair for me to comment on
11 the effectiveness of Mr. Harcz's counsel, your Honor. But
12 let me -- I think my second argument may be relevant to
13 what your question is, so --

14 THE COURT: Go ahead then.

15 MS. PORTER: If I might.

16 THE COURT: Go ahead.

17 MS. PORTER: To close off the first argument, we
18 allege that these false and misleading input into the
19 probable cause determination tainted the output, and under
20 the caselaw, that is a basis for sustaining our charges at
21 a motion to dismiss stage.

22 The second possibility, and I raise this because
23 defendants have attached the entire preliminary examination
24 transcript to their pleadings, and the Court can read it as
25 a whole. If the Court reads that transcript and you find

1 that the state court judge made a determination that Joe's
2 simple refusal to comply with the police order not to enter
3 the event --

4 THE COURT: Is that Mr. Harcz?

5 MS. PORTER: Mr. Harcz. I'm sorry.

6 THE COURT: Refer to him by his last name, yeah.

7 MS. PORTER: Yes, I'm sorry. That Mr. Harcz's
8 simple refusal not to accede to the police officers'
9 commands that he not go into the event, that that was a
10 sufficient basis to bind these charges over for probable
11 cause. You can conclude two things from that. The first
12 is that the state judge was wrong. If that's what he held,
13 that just not obeying the police was enough to cause Joe --
14 Mr. Harcz to be charged with that crime and for that to be
15 probable cause, that is incorrect.

16 And the second thing that your Honor can
17 conclude is that you need not be bound by that. Because
18 this case raises issues of Mr. Harcz's federal
19 constitutional claims, and if the issue is whether the
20 police gave a lawful command to him under the First
21 Amendment of the U.S. Constitution, and whether he was
22 obliged to comply with that, you are the arbiter of the
23 federal criminal -- the federal constitutional law. It is
24 your responsibility and your right to make that
25 determination on your own. So if you read that transcript

1 and you conclude that was the basis of the state court
2 judge's probable cause determination, A, it's incorrect,
3 and B, you are not bound by it.

4 I do -- you mentioned the videos, your Honor,
5 and I do want to point a few things out about that. The
6 impression I think that defendants seek to convey about
7 those videos is that everything you need to know about the
8 arrest is on those tapes. The plaintiff, Mr. Harcz in
9 particular, because that part is more about him, does not
10 agree.

11 The video tapes that were submitted to you are
12 excerpts from body cameras worn by just a few of the police
13 officers who are on the scene. Are there more body cameras
14 that have not been provided? We don't know that. I have
15 not seen any more than what the Court has seen, but even
16 those recordings begin only at 11 a.m. on the day of the
17 ADA event. They show absolutely nothing preceding the
18 event. And even just as to the event of Mr. Harcz's
19 arrest, they show angles that are dependent on where the
20 officer wearing the body cam was standing. They do not
21 show a full-on view.

22 I do have an excerpt from a news video which I
23 have showed to defense counsel and that I'm happy to show
24 to the Court. It is very, very short. But it is a view
25 from the back of what's happening. And what you can see

1 on --

2 THE COURT: The back of what?

3 MS. PORTER: I'm sorry, it's --

4 THE COURT: Or whom?

5 MS. PORTER: It's behind Mr. Harcz and the
6 police.

7 THE COURT: Okay.

8 MS. PORTER: So it's --

9 THE COURT: All right.

10 MS. PORTER: -- straight-on facing him. And
11 what can plainly be seen on the video is not Mr. Harcz
12 pushing anyone, not Mr. Harcz shoving anyone, not Mr. Harcz
13 hitting anyone with his white cane for the blind, but
14 instead the police officer yanking Mr. Harcz across the
15 barrier and his stick going flying and accidentally hitting
16 one of the officers who is standing there.

17 My point, of course that's not before your
18 Honor, it's not attached in any way to our pleading or to
19 anyone's pleadings. My point is that relying on these
20 certain angles of video tapes for a proposition that this
21 tells everything we need to know, and so of course probable
22 cause is undisputed, is incorrect. It is disputed. We
23 dispute the account that the defendants put forward about
24 what happened.

25 In particular, your Honor, we deeply dispute the

1 notion that Joe Harcz wanted to get arrested. It's
2 offensive. He did not set out that day to get arrested.
3 He is a man in his sixties who is blind, as we allege in
4 the complaint, who has been advocating for people with
5 disabilities for much of his life. He came at great
6 difficulty to that event. He was on the planning
7 committee. He was wearing, as your Honor saw in the video,
8 a 25th anniversary ADA celebration t-shirt.

1 said, "You can't do this to me. And by the way, my friends
2 behind me, I hope you're filming this, because if they
3 arrest me, that's against the law and I want someone
4 sometime to be able to see what happened."

5 And so this notion that he was trying to get
6 arrested and that probable cause is a foregone conclusion
7 and the judge found and that's all tied up, we do dispute
8 that greatly. And I do think your Honor is very free to
9 make your own determination if the question is whether just
10 complying with what the police said to do is enough to hold
11 him over.

12 Beyond that though we specifically allege false
13 and misleading testimony and that is also enough under the
14 law.

15 THE COURT: All right, thank you.

16 MS. PORTER: Thank you, your Honor.

17 THE COURT: Mr. Fedynsky, you're the one that's
18 up now, I think.

19 MR. FEDYNSKY: Thank you, your Honor. It's
20 simply insufficient as a matter of law to allege false and
21 misleading testimony when you have the actual preliminary
22 exam transcript before you and the videos. They have
23 offered two bodies of proof that they claim are false and
24 misleading, testimony at the preliminary exam and police
25 reports. The police reports are a dead letter. They were

1 not entered into evidence. They were not relied upon by
2 any of the state court judges. The testimony the Court can
3 read for itself and compare to the video that's before the
4 Court, and there is no reasonable basis to find any of that
5 testimony misleading, your Honor.

6 And as a matter of law, based upon caselaw
7 that's already out there, if you have a false arrest claim,
8 a malicious prosecution claim where absence of probable
9 cause is a keystone element, yet you've been bound over in
10 state court, you do not get to challenge that unless you
11 meet that very narrow exception that something false and
12 misleading was presented. And the cases where that's
13 actually been found is where a video is found afterwards
14 and a police officer is caught in a lie, or where there's
15 forensic testing and only two hairs were tested and not the
16 other three or four hairs. There is nothing of that degree
17 or kind in terms of misconduct here. And so this Court, as
18 a matter of issue preclusion, cannot revisit the probable
19 cause determination. Plaintiff is bound by that. It was
20 decided with finality in the state court proceeding.

21 And even if this Court isn't inclined to believe
22 that, upon de novo review, there is absolutely enough here
23 for a reasonable officer to conclude that there's probable
24 cause to arrest that individual. It's plain in the video,
25 it's plain in the admissions that Mr. Harcz makes on that

1 video about "I don't care about this barrier, I'm busting
2 through it." That is all there for a Court to hear and for
3 the Court to see. And it is a plainly lawful order to say
4 "stand behind this line."

5 Time, place, and manner restrictions, your
6 Honor, and I don't want to get too deep into the First
7 Amendment analysis, but inherent in the idea of a time,
8 place, manner restriction is police discretion to designate
9 within constitutional bounds where that place is. That's
10 what happened here. They cannot get past the probable
11 cause issue on any of these Fourth Amendment claims. And
12 for that reason those need to be dismissed with prejudice
13 as a matter of law. No discovery is going to change any of
14 that either, your Honor. There's nothing that can be
15 discovered about what happened at the moment of that
16 arrest, because that is the moment in time for the Fourth
17 Amendment claim that matters, and the moment in time that
18 matters for malicious prosecution is what did police know
19 at the time, why was he arrested, and where did these
20 charges come from.

21 THE COURT: It is very, like I said, very hard
22 for me to understand what I was seeing and what I was
23 hearing on that video. Do you have any problem with me
24 looking at plaintiff's video?

25 MR. FEDYNSKY: No, your Honor.

1 THE COURT: Okay.

2 MR. FEDYNSKY: I would just ask that the record
3 later on, supplemented copies be sent to all counsel and
4 that it be made part of the court file.

5 THE COURT: I'm sure she'll do that.

6 MS. PORTER: Your Honor, may I --

7 THE COURT: Yeah, please, final words on this
8 issue, Ms. Porter. Come on.

9 MS. PORTER: I was just going to hand the
10 computer to your law clerk, but let me talk again.

11 THE COURT: I've started with Apple 2's fifty
12 years ago, so.

13 MS. PORTER: Yes. Your Honor, I think most of
14 this is addressed in our briefing and I know you've read
15 it. In response to counsel's presentation, I point out
16 that we have two sets of claims for Mr. Harcz. There's a
17 federal and state false arrest claim, and there is a
18 federal and state malicious prosecution claim. I point
19 that out in response to the notion that the false police
20 reports are a dead letter. They're not, your Honor. The
21 police arrested Mr. Harcz and wrote false reports, and
22 based on those, detained him at the capitol building for a
23 long time, and then submitted him for prosecution. The
24 false police reports are highly relevant to that.

25 They're also relevant to the prosecution because

1 when, as I understand the malicious prosecution caselaw,
2 typically officers or somebody else are not going to be
3 held responsible for that unless it can be shown that they
4 overtook a prosecutor's independent discretion by, for
5 example, providing such false and misleading information
6 that the prosecutor is going forward on something that she
7 believes to be true that isn't.

8 Here the police wrote reports saying that
9 Mr. Harcz assaulted the officers, that he pushed them, that
10 he used his cane to strike at them. That is not true. It
11 is completely false. The only thing that Mr. Harcz did,
12 which he does admit doing, is that he refused to comply
13 with what he believed to be an unlawful police order, which
14 he by law is permitted to do.

15 And so no, it is not accurate to say that, you
16 know, so counsel says the video shows "I don't care about
17 this barrier, I'm going through." That is not sufficient
18 to state probable cause. That is Mr. Harcz believing that
19 the order that he's being given to remain behind the
20 barrier is unlawful, that the police are acting unlawfully.
21 Not only is he allowed to ignore that and go forward
22 anyway, he's even allowed under the case law to use force.
23 He didn't use force, but he could have.

24 With that, your Honor, may I hand the laptop to
25 your clerk?

1 THE COURT: No. I won't look at it now. I'll
2 look at it later.

3 MS. PORTER: Oh, okay. I'll submit it.

4 THE COURT: Right.

5 MS. PORTER: I'll submit it. Thank you, your
6 Honor.

7 THE COURT: Okay, thank you.

15 And frankly, I was a bit surprised by how broad
16 the First Amendment is in these confrontational type
17 situations. But I also came to the conclusion, tentative
18 conclusion subject to what you say and any further research
19 that I do, that a person, even if you have a licensed
20 organized group on public property, people that are
21 protesting are entitled to entrance, pretty much as the
22 plaintiff says, absent any kind of real threat or -- and by
23 real threat I mean imminent threat or something like that.

24 Now you might disagree with the law and I might
25 disagree with the law because it's harder to get rid of

1 someone than to prevent someone from getting there, but
2 here there's no evidence, other than your allegation that
3 one of the plaintiffs, Mr. Harcz, tried to get through the
4 police line, that there was going to be any kind of
5 confrontation in there. They were going to be passing out
6 literature, holding signs up, and that type of thing which
7 would not, and they said repeatedly that they were not
8 going to interfere with the meeting. So why keep them out
9 in a public location, in a public forum?

10 MR. FEDYNSKY: Well, I think on this record they
11 weren't kept out. A barrier was erected, your Honor, but
12 they were on the capitol grounds, they were right next to
13 where other --

14 THE COURT: Yeah, there was a separation between
15 them.

16 MR. FEDYNSKY: Absolutely. And I think it's
17 important the Court points out Bible Believers time of
18 decision because to have a case that overcomes qualified
19 immunity, it has to be clearly established under the law.
20 You can't hold police under a standard that was decided
21 after something happened. But even if you look at the
22 Bible Believers' case, your Honor, it's footnote one in my
23 reply brief, record number 43, page 4. According to the
24 en banc court in the Sixth Circuit, quote, "There were a
25 number of easily identifiable measures that could have been

1 taken short of removing the speaker, such as erecting a
2 barrier for free speech." No speaker was removed from the
3 capitol grounds in this case, your Honor. And in many
4 respects, that is the beginning and the end of the Court's
5 analysis. The cases where declaratory judgment is
6 appropriate where First Amendment rights are vindicated by
7 federal courts is where there was an arrest for trespass or
8 an arrest for refusing to disperse or an arrest for not
9 having a permit. There has to be some kind of ejection or
10 squelching or significant burdening of First Amendment
11 speech.

25 Under clearly established caselaw, drawing a

1 line that says "this is the time, place, and manner for
2 what each group wants to do" is perfectly reasonable, and I
3 think the Court pointed out the context in the nation these
4 days what's going on with barriers being put up and
5 discordant groups being kept apart. The police have a hard
6 enough job trying to keep the peace as it is, and to
7 second-guess or to question putting up this barrier, which
8 by the way wasn't put up in advance. It was brought after
9 a line of officers was used initially. That's all in the
10 preliminary examination transcript. But putting up a
11 couple of aluminum barriers and keeping a group away, but
12 within earshot and able to still attend the event, doesn't
13 meet any fact patterns like Bible Believers or like the
14 other cases cited by plaintiff where a First Amendment
15 claim was found to be viable.

16 And based upon what's before the Court, your
17 Honor, the capitol security team here had a narrow path to
18 hew, but I think they did it all within Constitutional
19 limitations. And I believe it's also apparent in the
20 video, I'm not sure if it's alleged in the complaint, that
21 the group that came there to protest also had a bullhorn.
22 So again, these are all developing facts, it's very similar
23 to the kind of Fourth Amendment reasonable arrest analysis,
24 but when officers are responding to scenes like this, you
25 don't want a fuse to get lit, you don't want public safety

1 to be threatened, and you want, even if they are discordant
2 groups, to be able to exercise their rights without
3 deploying a Heckler's Veto to stop another group's rights.

4 So I think under the caselaw, your Honor, it's
5 not as problematic as the Court introduced the issue.
6 Really, these two groups were permitted to coexist within
7 reasonable proximity, and the question here is, is it
8 beyond the pale of all reasonable outcomes for a police
9 officer to draw the line that was drawn here? Was it
10 plainly incompetent or a knowing violation of the law to
11 draw that line at the Austin Blair statue? And there's not
12 one case out there that says, yes, that's plainly against
13 the law, or you had to have been incompetent to do that.

14 Any fair viewing of the evidence in this case
15 that's fairly before the Court is that the police did an
16 admirable job. You might question the wisdom of it, you
17 might question what other methods could have been deployed,
18 but again, your Honor, the caselaw says the government has
19 some flexibility when it comes to these sorts of time,
20 place, and manner restrictions.

21 THE COURT: Well, I typed up a bunch of notes,
22 and any time, place, and manner restriction must be content
23 neutral, narrowly tailored to serve a significant
24 government interest, and leave open ample alternative
25 channels for the party to communicate. An alternative is

1 not ample if the speaker is not permitted to reach the
2 intended audience, Saieg against City of Dearborn, 641 F.3d
3 727, (6th Circuit 2011.)

4 That's the problem.

5 MR. FEDYNSKY: Well, the thing about Saieg, your
6 Honor, that case is the restriction that was struck down is
7 that leafletting was only permitted at a festival at a
8 stationary booth.

9 THE COURT: At a stationary booth, right.

10 MR. FEDYNSKY: And not by walking around. There
11 was no -- nothing analogous here happened, your Honor. A
12 protest was able to occur, the booing, the heckling, the
13 chanting, the speech, the handing of leafletting still
14 could happen, they just couldn't do it at the foot of the
15 stage.

16 THE COURT: Yeah. But you say "could happen."

17 MR. FEDYNSKY: No one was ejected from --

18 THE COURT: And I agree that it's harder to
19 eject someone than to prevent them --

20 MR. FEDYNSKY: Sure.

21 THE COURT: -- from doing something. On the
22 other hand, how do you know that they were going to be
23 booing, heckling, etcetera, etcetera?

24 MR. FEDYNSKY: Sure.

25 THE COURT: The chanting I heard was, "Let us

1 in. Let us in." That's what they were protesting outside.
2 They weren't allowed in.

3 MR. FEDYNSKY: And if you watch the video,
4 particularly when Mr. Harcz is arrested, the other
5 spectators are right there next to them. They were in the
6 event. They were simply kept behind a barrier, but they
7 were in the event, your Honor.

8 THE COURT: Come on, Mr. Fedynsky, they were too
9 far away, unless you had some special lens on the cameras
10 that I couldn't recognize.

11 MR. FEDYNSKY: Well, your Honor --

12 THE COURT: How many feet do you think they were
13 apart?

14 MR. FEDYNSKY: Apart from where? You've got to
15 set the goalposts.

16 THE COURT: Where the crowd was.

17 MR. FEDYNSKY: Sure. Well, the complaint, and
18 we'll accept what the complaint alleges there --

19 THE COURT: As I see it, what -- were there
20 speakers and things like that up there and because there's,
21 from what I saw, there's a substantial, and I know you have
22 telephoto lens and wide angle lens, so it's hard to tell.
23 But it seems to me to be a substantial difference between
24 where the plaintiffs and their supporters where and where
25 the other people attending the meeting were. In other

1 words, those that were, you might say approved by the
2 sponsors.

3 MR. FEDYNSKY: I think that's incorrect, your
4 Honor. If you look at those videos, particularly when
5 Mr. Harcz is led away. Let's set the context factually.
6 Plaintiff alleges in their complaint variously that the
7 barrier was 130 to 150 feet from the stage. In that 130 to
8 150 feet, there are multiple rows of chairs, there's an
9 audience, there's people that populate that area, and then
10 there's people off to the side and on the grass. The
11 Austin Blair statue is sort of up on a curb with grass
12 around it, if I'm not mistaken, and there's plants and
13 things of that sort. But if you watch where the edge of
14 that crowd is in relation to where that barrier was placed,
15 my best estimate is that's 10 to 20 feet away. They were
16 right next to other people who were in wheelchairs, other
17 people who were in plastic chairs, other people who were at
18 that event listening, participating, engaging.

19 And being placed in that location does not
20 violate any clearly established law, your Honor. Because
21 had they been placed closer, and again this is a police
22 decision, not a judicial decision to be second-guessed, but
23 in terms of line drawing, the Court's question isn't, well,
24 where would it have been better, the question is at what
25 point does it violate the Constitution.

1 I think they might have caselaw that says if
2 they said, "Go across Capitol Street, you can't cross
3 Capitol Street, park a bus in front of them, do whatever,"
4 that might violate the Constitution. But where they're at
5 at the foot of the Austin Blair statue, in the thick of it
6 all, not that far from other participants, other people,
7 within earshot, within view of everything, they were not
8 ejected. They were not excluded. It's a visible fiction
9 in their complaint that they say they were excluded. And
10 the Scott case, which is a Fourth Amendment case involving
11 a fatal police chase, the Supreme Court said --

12 THE COURT: Yeah.

13 MR. FEDYNNSKY: -- it is legal error to accept a
14 visible fiction or a legal conclusion when objective
15 evidence tells another story. And the evidence that's
16 before this Court, which is properly before this Court,
17 which no discovery's going to change because it's apparent
18 where they were in relation to other participants. And
19 it's nothing like the City of Dearborn case or the Bible
20 Believers case.

21 And at the very least, your Honor, you say that
22 under the clearly established prong of qualified immunity,
23 there's no First Amendment claim here. It has to be
24 plainly violative of the Constitution or something that's
25 so plainly incompetent that these police did that they had

1 to have known they were violating the law.

2 THE COURT: Okay, thank you.

3 MR. FEDYNSKY: Thank you, judge.

4 MS. PORTER: Not only was it plainly
5 incompetent, it was outrageous. And that description of
6 the law does not match the law at all. This is not just
7 Bible Believe -- I agree with the Court that Bible
8 Believers was a tour de force in summarizing what has been
9 the law for many, many years.

10 And I will start with 80 years ago the Supreme
11 Court in Schneider versus State of New Jersey, one is not
12 to have the exercise of his liberty of expression in
13 appropriate places abridged on the plea that it may be
14 exercised in some other place.

15 The notion that they were still technically on
16 capitol grounds does not in any way, shape, or form allow
17 the police to keep my clients behind a barrier and prevent
18 them from entering the event. It doesn't matter if they
19 are, you know, ten feet from the person sitting in the last
20 chair in the last row. That is not acceptable. This was
21 an event with booths, with food, with music, with water,
22 opportunity to mingle around the crowds. What my clients
23 wanted to do was attend, speak with people, hand out their
24 leaflets, hand out their stickers.

25 Nobody used a bullhorn. One of my clients,

1 Ms. Canter, possessed a bullhorn. The police told her,
2 "Don't you dare turn that thing on or we'll take it away
3 from you." She said, "Fine." There was no use of
4 bullhorns, they were not doing that.

5 The Sixth Circuit has addressed this issue very
6 directly in cases that are just like ours, just like this,
7 your Honor. Parks versus Finan in 2004. A man wanted to
8 carry a sign and hand out leaflets at a rally at the state
9 capitol square. He was not ejected from the grounds. He
10 wasn't hauled away from the grounds. The police there told
11 him that he had to stay on a sidewalk just outside the
12 rally. That was a violation of the First Amendment.

13 Parks versus City of Columbus in 2005. There
14 the plaintiff had a sign and he wanted to distribute
15 religious literature at an event that was free and open to
16 the public. Just like this. He wasn't ejected from the
17 grounds, he was not hauled away. The police told him to
18 stay behind a barricaded area and they threatened to arrest
19 him if he didn't comply. That was a violation of the First
20 Amendment.

21 These cases stand for the proposition that just
22 like the Supreme Court said in Schneider and repeated again
23 in United States versus Grace in 1983, being restricted
24 behind a barrier or being limited to a sidewalk, that is
25 not okay. That is not sufficient to satisfy the First

1 Amendment. It wasn't okay to keep my clients behind a
2 barricade. It wasn't okay to put them behind a line of a
3 police. It was not okay not to let them in. And it just
4 does not matter that they were still standing on the
5 capitol grounds at the time that they were restricted.

1 content-neutral provisions, it's true, you know, it doesn't
2 matter what the leaflets say if you're -- you just have to
3 be behind the booth.

4 Here they had nothing like that. There was no
5 capitol rule, there was no permit permitting scheme, there
6 was no legislative structure that the police were
7 enforcing. They were keeping my clients out because they
8 didn't want my clients' message which conflicted, they
9 believed, with the message of the organizers of the event
10 to disrupt what they were doing. They didn't like the
11 message. It was a content-based restriction.

12 So our situation here is much worse for the
13 state, much worse for the defendants than the Saieg versus
14 City of Dearborn and Bays versus City of Fairborn.

15 But I also want to point out that in both of
16 those cases the Sixth Circuit said no, these were
17 situations where plaintiffs had signs and leaflets, they
18 wanted to go into a place that was free and open to the
19 public, the police said no, you can't come in. The Sixth
20 Circuit said no, that is unconstitutional.

21 The defendants here have also not provided the
22 Court with any response at all that I can tell to the fact
23 that there is not a compelling state interest or even a
24 significant government interest here. Mr. Fedynsky says
25 the police did an admirable job and that, you know, I

1 think -- I think the notion was when officers are
2 responding to something like this, they don't want
3 someone's fuse to get lit.

4 Your Honor, these general appeals to crowd
5 control or to public safety, the courts have considered
6 those arguments again and again, and they do not fly. They
7 are insufficient. The compelling or significant government
8 interest must be a real harm. It cannot just be
9 conjectural. And in this case there was no real harm.

10 And one thing the defendants do not mention in
11 their briefs, they do not mention today, your Honor touched
12 upon it, is that this did not start when the plaintiffs got
13 upset, when they were yelling, "Let me in." This started
14 days before when they made a concerted decision not to
15 allow my clients to enter the event. They hadn't done
16 anything. That day my clients, most of whom are blind and
17 therefore would have no other way to find one another
18 unless they set a meeting place, picked a spot, you know,
19 corner nearby the capitol, to gather. One had a sign that
20 said "National Federation For the Blind." Some of the
21 others had other signs, you know, having to do with some of
22 the issues about the ADA that they objected to. They were
23 just standing there when a sergeant from the Michigan State
24 Police comes up to them, and this is alleged in the
25 complaint, "Are you planning to enter the event today?"

1 "Oh yes. Yes, we are." "Well, you can't go in."

2 And the police did the same thing to Mr. Harcz
3 and Ms. Canter and Ms. Dean when they approached from a
4 different angle, just seeing them holding leaflets and
5 holding signs, that was what caused the police to tell them
6 they could not enter. Those -- there is no compelling
7 state interest, there's no legitimate government interest
8 in keeping them out.

9 The danger, and, you know, again, this isn't
10 what is addressed, had to do with the content of their
11 message.

12 The last issue I'll address on this with respect
13 to qualified immunity, the Bible Believers case did come
14 out in 2015, I don't remember the month. But this event
15 was in --

16 THE COURT: October.

17 MS. PORTER: Thank you, your Honor. So that was
18 after. But this line of cases that produced Bible
19 Believers is a very long line of cases going decades, going
20 back decades, not only from the U.S. Supreme Court, but
21 within this circuit as well. If the police want to tell
22 this Court that they had no idea that this was the law,
23 that is on them, your Honor. That is unreasonable. The
24 standard for qualified immunity was were the rights at
25 issue clearly established at the time of the alleged

1 misconduct. That is the standard for qualified immunity.

2 These rights absolutely were clearly established
3 and the fact patterns in the cases that we've cited and
4 that I've discussed with you this afternoon mirror what
5 happened here exactly. The fact pattern is exactly the
6 same and the outcome is exactly the same. There is not
7 something different that happened here. The only thing
8 different is that this is worse. Thank you, your Honor.

9 THE COURT: All right, thank you. Have I hit
10 all the issues?

11 MR. FEDYNSKY: Your Honor.

12 THE COURT: What did I miss, Mr. Fedynsky?

13 MR. FEDYNSKY: Well, we did brief what the state
14 interests at stake are, and those are recognized by courts
15 *Hill v Colorado*, a U.S. Supreme Court decision cited on
16 page six of our reply brief. *Parks v Finan*. Again, the
17 state has a substantial interest in providing the permitted
18 speakers are able to engage effectively in expressive
19 activities. And as far as the qualified immunity analysis
20 goes, your Honor, lots of these cases are decided in the
21 Sixth Circuit two to one, or in the en banc scenario. If
22 you read *Bible Believers*, that one was eight to six, I
23 think. And if you read the dissent, it's pretty
24 compelling.

25 THE COURT: Yup, but we're all bound by the

1 majority.

2 MR. FEDYNSKY: Oh, sure. I understand, your
3 Honor, but where you have issues that are so fact
4 specific --

5 THE COURT: I see what you're saying is, but how
6 are the police supposed to know --

7 MR. FEDYNSKY: Exactly and what's --

8 THE COURT: -- if the judges can't agree?

9 MR. FEDYNSKY: -- what's clearly established
10 here, and can you really hold people at fault for that.
11 And lawyers can make a fine point about what exclusion is
12 and what ejection is, but there was no trespass citation
13 here, there was no ejection from the grounds, there was no
14 threat of arrest. And if the answer is, well, this is
15 unlawful, then what time, place, and manner restriction
16 would be lawful in a similar situation where you have the
17 concerns of permitted speakers not wanting a Heckler's Veto
18 to disrupt their events, and frankly, your Honor, and
19 again, I haven't briefed this issue. I don't think
20 plaintiff has either, but if you're conducting a permitted
21 event, people coming up and chanting, even people coming up
22 and silently distributing leaflets in the middle of a
23 ticketed event, walking through seating areas, imagine if
24 you're having a wedding or if you're having any kind of
25 public type of ceremony, that is disruptive. And it's sort

1 of like the old line, your right to throw a punch ends
2 where my nose begins. If someone's having speech and
3 someone else wants to have their discordant speech, what
4 are police supposed to do in terms of how they coexist, if
5 at all? And if you are to erect --

6 THE COURT: Here's the problem with that
7 argument. You're talking about discordant speech and
8 disruption of meeting or rally that's going on on the state
9 capitol grounds without any evidence that I have seen that
10 that occurred or was threatened.

11 MR. FEDYNSKY: Well, there's these meetings and
12 there's these allegations about the concerns of the
13 organizers who came to police, so if there wasn't any worry
14 about disruption, any worry about something being off, it
15 seems to me the police are simply responding to the
16 concerns that are provided. And if you want --

17 THE COURT: But think of how weak that argument
18 is. Then anybody could exclude just about anybody else at
19 a public meeting, because "I'm concerned about it." I mean
20 that's addressed pretty thoroughly in Bible Believers. I
21 know that is later.

22 MR. FEDYNSKY: Sure.

23 THE COURT: But it, like Ms. Porter says, there
24 are a lot of cases that back up what they say, and a lot of
25 cases maybe on the other side, but --

1 MR. FEDYNSKY: Sure.

2 THE COURT: But the cases it cites are cases
3 that are decided.

4 MR. FEDYNSKY: The problem with Bible Believers,
5 your Honor, was the order from the police saying, "Leave
6 this place or we will cite you or we will arrest you."
7 That was the problem, and there the issue is what do you do
8 when offensive speakers are surrounded by folks who are
9 throwing empty bottles and doing other things that, again,
10 is a challenge to public order and public safety. Here we
11 have a very --

12 THE COURT: Here are the -- that's the funny
13 thing about Bible Believers is as I read it, the people
14 that were upset about the Bible Believers were throwing the
15 things and causing the issue, and the police, instead of
16 going after them, the troublemakers, went after the Bible
17 Believers who were peaceful.

18 MR. FEDYNSKY: But if you read the dissent,
19 there is a very different view of actually what was
20 happening and what was depicted.

21 THE COURT: Is there? Okay.

22 MR. FEDYNSKY: And I think what we can agree on,
23 at least in terms of what's objectively before the Court,
24 is that no similar order of ejection, threat of trespass
25 citation, or any such thing happened. What happened here

1 was a time, place, and manner restriction, and it was
2 content neutral. If you read the preliminary exam
3 transcript, Sergeant Hernandez had no idea who was
4 protesting what or what the issue was. The question was,
5 how can you have an orderly use of this public space when
6 you have one group that's oil and another group that's
7 water. And what are the police supposed to do there, your
8 Honor. Let them mix? Is that the clear established law?

13 MR. FEDYNSKY: Would you allow it in this
14 courtroom during a proceeding?

15 THE COURT: No, because the freedom --

16 MR. FEDYNSKY: That's a different issue.

19 MR. FEDYNSKY: Sure. I understand, your Honor.
20 But I think --

24 MR. FEDYNSKY: Sure. And we --

25 THE COURT: Call the marshals down if you

1 aren't.

2 MR. FEDYNSKY: And we accept limits even in the
3 public square on speech, your Honor. And again, if you
4 watch that video and listen, what was deployed was a
5 barrier that allowed plenty of speech to happen and to be
6 shared.

7 And frankly, your Honor, if you look at the way
8 the capitol grounds are laid out, if you look at the way
9 that people were able to say and do what they wanted,
10 depending on where they were placed in those capitol
11 grounds, there is no substantial burdening of First
12 Amendment rights here such that it lines up with the other
13 cases. It just, it doesn't line up with those other cases.
14 It may have been unfortunate that, you know, these folks
15 couldn't come together for the 25th anniversary and have a
16 joint event, but when police are facing a situation like
17 that where folks are competing for the same space that's a
18 public forum, they need to be given some level of
19 flexibility, some level of deference in terms of how to
20 achieve that.

21 THE COURT: Well, yeah, you've put your finger
22 on it to me not as a judge so much that as a person, it's
23 regrettable that people that supposedly support the same
24 idea and are apparently everybody is very sensitive to
25 handicap rights and are pushing handicap rights, and that

1 goes for both the defendants and the plaintiffs. I know
2 you have --

3 MR. SCHRAMM: Your Honor, may I have --

4 THE COURT: -- a good opportunity --

5 MR. SCHRAMM: -- 30 seconds just to add on to
6 that?

7 THE COURT: Yeah, just a minute. Now you have a
8 good opportunity to destroy that joint effort, and that's
9 what you're in. Anything you want to say?

10 MR. SCHRAMM: Well, I -- if you don't mind. I
11 think what you're getting at is that you didn't see that
12 when the plaintiffs have arrived at the statue or on the
13 capitol grounds there was a basis upon which for the police
14 to believe there was going to be some issue or concern that
15 required this kind of action.

16 THE COURT: Okay.

17 MR. SCHRAMM: And I think that's where your
18 question has been going, and I wasn't sure that --

19 THE COURT: That's where it's going.

20 MR. SCHRAMM: -- codefendant was getting at.
21 And there was that. You had the rumors and concerns made
22 by the permittee that there was going to be disruption, so
23 the police now have knowledge. The police are on the
24 grounds, and they see a group of people coming with signs
25 that are protesting the exact thing that's going on. A

1 person showing up with a bullhorn, and you don't use
2 bullhorns to communicate with the person next-door. You
3 use bullhorns, I mean let's not be silly, we all know what
4 they're used for. They're used to disrupt an environment
5 and prevent the speaker from speaking. You can look at any
6 university where they've been used.

7 So that's what the police were confronted with
8 at the time that this all occurred. So you've got a group
9 of people with protesting signs and a bullhorn coming up,
10 exactly what the permittees thought was going to happen or
11 may happen, and the police begin to act. And when they
12 begin to act it evolves. It didn't evolve into a fence
13 first, it involved into, "Hey, what are you doing? Where
14 are you going? You can't disrupt the event." And then it
15 evolved, "No, we're going to do what we want." And I'm
16 just paraphrasing, I'm not trying to speak directly.

17 THE COURT: I understand.

18 MR. SCHRAMM: And then the fences go up and it
19 just keeps evolving. And that's how the police operate.
20 They didn't know what the event was going to be. Nobody
21 had a crystal ball. And that's the difference here. And
22 that's where their rights were not trampled upon. That's
23 where they were given the right to protest and do whatever
24 they needed to do, and it's why it's different than the
25 cases cited. Thank you, judge.

1 THE COURT: Okay, thank you. Final words,
2 Ms. Porter.

3 MS. PORTER: Thank you, your Honor. I really, I
4 can't believe some of what I'm hearing. Mr. Fedynsky
5 argues there was no ejection from the grounds and no threat
6 of arrest. Tell that to Mr. Harcz who was dragged through
7 the promenade, through the event in handcuffs by two
8 officers when he said that he was going in. They
9 absolutely -- they absolutely ejected him from the grounds.
10 They absolutely threatened all of them with arrest if they
11 didn't comply with the orders. So I'm not sure where that
12 comes from.

24 And the general theme that I sense running
25 through both counsel's comments is, you know, whatever the

1 law says, it seems like it might be a good idea to just
2 sort of have people settle down. It doesn't hurt them so
3 bad. This did hurt my clients. It really did, your Honor.
4 This was a complete shock. It was very demoralizing to
5 them to see their state police standing there, people who
6 had done absolutely nothing wrong who were coming, they had
7 leaflets printed, they wanted to speak to people. They
8 were not intent on any disruption. They told the police
9 that when the police asked, "What are you here to do?" "We
10 are here to use our voices. We are here to use
11 conversations. We want to pass out our leaflets." To have
12 the State Police engage in that kind of conduct let others
13 in around them but keep them, that did harm them greatly.
14 It harmed their perceptions of government, it harmed their
15 faith that this is -- this is a nation of laws that are
16 governed fairly, and the idea that we should ignore decades
17 and decades of established caselaw and think, well, these
18 police have a tough job, they were just trying to do the
19 best they could, that's unacceptable, your Honor.

20 This is a nation of laws, and First Amendment
21 principles are extremely important. The caselaw talks in
22 very, you know, flowery florid terms about the importance
23 of these because they are so fundamental to who we are as a
24 country. Your Honor spoke about how particularly in this
25 day and age this is an important issue, and I agree with

1 the Court, it is. To allow something like happened to my
2 clients to pass without holding these folks accountable for
3 their conduct is unacceptable and unlawful, your Honor.
4 This is a situation that has been addressed by the courts
5 many, many times, and it is imperative, particularly in a
6 time where we have folks who should be coming together, who
7 should be coming in agreement, not to silence voices of
8 people who dissent.

13 I thank you -- thank you, your Honor, for your
14 careful attention to this, and if you have any other
15 questions, I'm happy to answer them.

16 THE COURT: I don't. Let me tell you the
17 problem. I had hoped to make a ruling off the bench this
18 afternoon, but I'm not going to. I will issue a decision
19 and it won't be a long opinion. It will be a decision just
20 with what the decision is and then maybe some cites to
21 support it.

1 I'm going to be back.

2 MR. FEDYNSKY: Thank you, your Honor.

3 THE COURT: Sorry about that. But thank you
4 very much for your presentations.

5 MR. SCHRAMM: Thank you, your Honor.

6 MS. PORTER: Thank you, your Honor.

7 MR. MEIHN: Thank you, your Honor.

8 (At 3:22 p.m., proceedings concluded.)

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CERTIFICATE OF REPORTER

I, Bonnie L. Rozema, CER, do hereby certify that the foregoing transcript consisting of 62 pages, is a complete, true, and accurate transcript, to the best of my ability from the audio recording, of the proceedings and testimony held in this case on November 2, 2017.

I do further certify that I prepared the foregoing transcript.

/s/ Bonnie L. Rozema

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Notary Public in and for
Kent County, Michigan
My commission expires:
March 26, 2019
Acting in the County of Kent